IN THE

SUPREME COURT OF THE UNITED STATES

1990

DAVID NEIL, Petitioner, vs. ANDREW ESPINOZA, individually and as an heir and also an Executor of the Estate of Arthur Espinoza, deceased; THE ESTATE OF ARTHUR ESPINOZA, DECEASED; JEANNIE ESPINOZA, JUDITH ESPINOZA, ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, individually and as heirs-at-law of ARTHUR ESPINOZA Respondents.	)	No. 89-1064

RESPONSE TO PETITION FOR WRIT OF CERTIORARI UNDER SUPREME COURT RULE 15

Scott H. Robinson
GERASH, ROBINSON, & MIRANDA, P.C.
Attorneys for Respondents
Member, U.S. Supreme Court Bar
1439 Court Place
Denver, Colorado 80202
Telephone: (303) 825-5400

January 24, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Whether police defendants in 42 U.S.C. § 1983 civil rights cases arising out of fatal shootings have an automatic right to an interlocutory appeal upon denial of meritless motions for summary judgment based on "qualified immunity"?

2. Does a police officer employed by a municipality have "qualified immunity" from suit under 42 U.S.C. § 1983 as a matter of law, when he shoots and kills an unarmed, intoxicated citizen?

3. Whether the constitutional right to life was "adequately established" before July 30, 1977, so as to make actionable under 42 U.S.C. § 1983 a police officer's actions in shooting to death an unarmed man, as he lay intoxicated in a Denver park?

PARTIES

The City and County of Denver, Colorado, is also a party.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

IN THE

SUPREME COURT OF THE UNITED STATES

1990

DAVID NEIL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 89-1064
	)	
ANDREW ESPINOZA, individually and as an heir and also an Executor of the Estate of Arthur Espinoza, deceased; THE ESTATE OF ARTHUR ESPINOZA, DECEASED; JEANNIE ESPINOZA, JUDITH ESPINOZA, ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, individually and as heirs-at-law of ARTHUR ESPINOZA	)	
	)	
Respondents.	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI UNDER SUPREME COURT RULE 15

OPINIONS AND JUDGMENTS BELOW

The trial court denied Petitioner's Motion for Summary Judgment based on his claim of "qualified immunity"; the Colorado Court of Appeals declined to review denial of summary judgment based on qualified immunity, prior to trial. The Colorado Supreme Court denied certiorari.

JURISDICTION

28 U.S.C. § 1257 and Mitchell v. Forsyth, 472 U.S. 511, 106 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

STATUTES AND CONSTITUTIONAL PROVISIONS

Respondents are satisfied with Petitioner's presentation.

STATEMENT OF THE CASE

Arthur Espinoza was shot to death by Petitioner Neil, while drunk and helpless on July 30, 1977. This § 1983 suit, was brought by his children in 1977. Summary judgment was initially granted by the trial judge in reliance on Jones v. Hildebrant, 191 Colo. 550 P.2d 339 (1976). Thereafter, in Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981), the Colorado Supreme Court reversed Jones, holding that the federal civil rights of Arthur Espinoza's children did not "merge" with a state wrongful death claim, remanding the case for trial. This Honorable Court granted certiorari, but later dismissed for lack of final judgment. O'Dell v. Espinoza, 456 U.S. 430, 102 S.Ct. 1865, 72 L.Ed.2d 237 (1982).

The case was then returned to state court, and went to trial in April, 1985. Retrial resulted in a verdict against Petitioner, with a hung jury on the claims against the other remaining defendant, the City and County of Denver. The verdict against Petitioner was reversed in Neil v. Espinoza, 747 P.2d 1257 (Colo. 1987), because of an irregularity in the return of the verdict.

Upon remand, the case was set for retrial. Prior to trial, Petitioner moved for summary judgment on various and sundry grounds, one of which was a claim of "qualified immunity". In seeking summary judgment, Petitioner claimed that the facts as established by the first trial made him "immune" from suit, that he could be held liable neither to Arthur Espinoza's estate nor

to his children for shooting Espinoza to death.

The trial court denied summary judgment, holding that there were disputed facts relative to the issue of immunity. The trial court granted a stay, however, permitting immediate appeal of the qualified immunity issue, relying on this Court's decision in Mitchell v. Forsyth, supra, and a Tenth Circuit decision, Jones v. City and County of Denver, 854 F.2d 1206 (10th Cir. 1988).

The Colorado Court of Appeals dismissed the appeal, for lack of a "final judgment", disregarding both Mitchell and Jones. The Colorado Supreme Court declined certiorari. Certiorari has been sought in this Court, seeking not just a ruling that denials of "qualified immunity" in 42 U.S.C. § 1983 cases are immediately appealable but also a ruling that, in 1977, a police officer should not be held to have had knowledge that shooting an unarmed man to death might be in violation of that man's constitutional rights, and those of his children.

SUMMARY OF ARGUMENT

Respondents join in the request that this Court grant certiorari, upon a limited issue, to resolve the troubling and persistent claim now "in vogue", at least in the Tenth Circuit, that police officer defendants in federal civil rights shooting cases should be entitled to automatic pre-trial appeals from denials of summary judgment on "qualified immunity" grounds, in all 42 U.S.C. § 1983 cases. Respondents hope that the Court will grant certiorari, and hold that such civil right defendants do not have right to an interlocutory appeal, prior to trial, at

least where, as here, the claim of "qualified immunity" is clearly meritless.

Respondents also believe that if certiorari is granted on other issues, that this Court should hold that, as of July 30, 1977, the right to life was "adequately established" as a matter of federal constitutional law so as to put an individual police officer on notice that the use of deadly force in shooting an unarmed, intoxicated man to death, was actionable.

ARGUMENT

Respondents join in the request that this Court grant Certiorari, to decide the immediate appealability of claims of qualified immunity from suit under 42 U.S.C. § 1983, upon denial of summary judgment. Both Mitchell v. Forsyth, supra, and Jones v. City and County of Denver, supra, appear to hold that a trial judge's denial of qualified immunity, at least "to the extent that it turns on an issue of law", is an appealable final decision under 28 U.S.C. § 1291, as a legally supportable claim of immunity is the right "not to stand trial" at all. Mitchell v. Forsyth, supra.

Mitchell involved federal executive acts, not the conduct of a municipality's police force. In Jones, however, the Tenth Circuit extended Mitchell to permit pre-trial appeal of denial of summary judgment sought on "qualified immunity" grounds even though it involved claims made against a police officer, as opposed to allegations made against presidential cabinet members. Thus, although Mitchell can easily be distinguished as involving

federal executive authority, nevertheless the Tenth Circuit's decision in Jones appears to give police officers the right to a pre-trial appeal on qualified immunity, no matter what the facts, in all 42 U.S.C. § 1983 cases.

The Tenth Circuit's holding in Jones has had the effect of creating for police officers within the Tenth Circuit an automatic right to interlocutory appeal on "qualified immunity", no matter what the facts, and no matter how indefensible the claim of immunity. Such a procedure is both duplicative and unlawful, inconsistent with the purposes of § 1983.

Obviously, giving all police officer defendants a right to an interlocutory appeal on immunity in police shooting cases has the effect of squandering our Courts' limited resources. Why should police officers be given a right that no other litigant has, a right to raise a defense, and then litigate it through appeal, without ever having to stand trial, even where, as here, no factual basis exists for a claim of "qualified immunity"? This anomalous situation is hardly conducive to judicial economy.

Moreover, the state of the law as it now exists in the Tenth Circuit is utterly inconsistent "in both purpose and effect" with the remedial objectives of the federal civil rights laws. See Felder v. Casey, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 123 (1988). Unless this Court intervenes, all 42 U.S.C. § 1983 cases filed within the confines of the Tenth Circuit will continue to first be subjected to an interlocutory appeal on the issue of

"qualified immunity", following denial of summary judgment, before any civil rights litigant can get his or her case to trial. This is, of course, wholly at odds with what this Court has held to be "the dominant characteristic of civil right actions: they belong in court." See Burnett v. Grattan, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984). See also Felder v. Casey, supra.

Respondents would strongly urge this Court to grant certiorari. Numerous Tenth Circuit litigants are being forced tc defend meritless "qualified immunity" appeals, as a condition precedent to trial in 42 U.S.C. § 1983 cases. The factual circumstances as revealed in this appeal certainly illustrate how this procedure is being utilized to the disadvantage of civil rights claimants in particular, and to the court system in general.

In this case, the position of the Petitioner is that he could not have known in July 30, 1977, that his shooting an unarmed man to death as that man lay completely intoxicated in a public park would subject him, as a police officer of a municipality within the state of Colorado, to potential suit for damages from the estate of the decedent and his children. Indeed, the gist of the claim for summary judgment is the assertion that Petitioner Neil acted in an "objectively reasonable" manner in shooting Arthur Espinoza to death. Reference to the facts of the case as established by trial, however, illustrate how insupportable the claim of "qualified

immunity" was in this case, why the trial court had no choice but to deny summary judgment on that defense, and why the creation of a right to an immediate appeal of such denial is completely inconsistent with the remedial purposes of 42 U.S.C. § 1983.

Here, the facts revealed that the fatal shot was fired by Petitioner Neil from approximately 10 feet away, despite the fact that Neil saw no gun in Arthur Espinoza's hand at the time of the shooting, a shooting which was designed to prevent Espinoza from "pulling his hand out of his pants". Citizen eyewitnesses testified that Neil and two other officers approached Arthur Espinoza and another man without saying anything, that the two men were lying on the ground, did nothing at all to provoke the shooting, and were so intoxicated that "they didn't know what was going on." To these eyewitnesses, the shootings were "cold blooded murders", nothing less.

It is not surprising that the case that was previously submitted to a jury for resolution. Here, the trial court properly denied summary judgment on the claim of "qualified immunity". Indeed, to even argue that Petitioner Neil was "immune" from liability under § 1983 for shooting an unarmed intoxicated citizen to death is ridiculous, wholly at odds with the legislative history of § 1983, which was enacted to remedy abuses under "color of state law" occurring after the Civil War. The credibility of Petitioner Neil and indeed, the credibility of all of the eyewitnesses, is part and parcel of the entitlement to trial, effectively precluding summary judgment even where, as

here, a claim of "qualified immunity" is made. See Graham v. Connor, 490 U.S. ___ n.12, 109 S.Ct. ___, 104 L.Ed.2d 443 (1989). Only a jury could properly decide if Petitioner Neil acted with "objective reasonableness" under the circumstances of this case. Contrast Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

Although Respondents believe that, on the merits, the claim of "qualified immunity" as made in this case is totally groundless, nevertheless Respondents join in requesting that this Court grant certiorari. As was argued by Petitioner, state courts have split on the immediate appealability of denials of immunity, prior to trial. The impact of Jones v. City and County of Denver upon civil right litigants within the Tenth Circuit cannot be over-emphasized, however, as without intervention from this Court, civil right litigants will and have been subjected, on a routine basis, to interlocutory appeals on specious "qualified immunity" grounds, whenever it is alleged that a police officer's actions violated 42 U.S.C. § 1983. A definitive ruling by this Court concerning the circumstances under which defenses of "qualified immunity" are properly subjected to pre-trial appeals as a matter of right is certainly necessary to protect civil rights litigants, at least those injured by state action within the Tenth Circuit.

Petitioner urges that, in attempting to create "qualified immunity" for Petitioner Neil, recognition of a constitutionally protected right of association has occurred only belatedly, so as

to render Respondents in this case remediless to redress the unconscionable murder of Arthur Espinoza in 1977. This focus, however, is entirely misplaced: indisputably Arthur Espinoza had a right not to be unlawfully shot, to not be killed through the unreasonable use of force by a state officer, in violation of the United States Constitution. The fact that his children can now recover for his death, as opposed to Arthur Espinoza himself, does not give rise to immunity; the right to life has now been established for over two centuries.

The rights of Arthur Espinoza's children to associate with their father was not created in Espinoza v. O'Dell, supra, but rather, derive from the United States Constitution. Nor was Espinoza v. O'Dell, supra, the first case holding that family members have a right to recover under 42 U.S.C. § 1983 for wrongful killings under color of state law. See, e.g., Brazier v. Cherry, 203 F.2d 401 (5th Cir. 1961), cert. denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136; Hall v. Wooten, 506 F.2d 564 (6th Cir. 1974); Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977); Perkins v. Salafia, 338 F. Supp. 1325 (D. Conn. 1972). See also Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

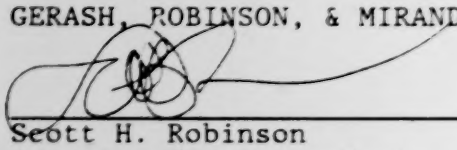
No basis exists for the claim of "qualified immunity" raised by Petitioner below, and hereafter on appeal. Manifestly, this issue could not have been resolved in favor of Petitioner on motion for summary judgment. However, Respondents join in the request for certiorari, for the reasons previously stated.

CONCLUSION

Respondents join in the request that this Court grant certiorari, to ask this Court to hold that civil right litigants cannot be automatically subjected to meritless appeals of "qualified immunity" claims in 42 U.S.C. § 1983 cases, and to hold that summary judgment was properly denied in this case.

Respectfully submitted,

GERASH, ROBINSON, & MIRANDA, P.C.



Scott H. Robinson
Attorney for Respondents
1439 Court Place
Denver, Colorado 80202
Telephone: (303) 825-5400